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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Appellant,)	NO. 38532
)	
v.)	
)	
FARON RAYMOND HAWKINS,)	RESPONDENT'S BRIEF
)	
Defendant-Respondent.)	
_____)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA

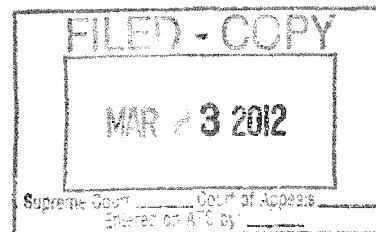
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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
Nature of the Case.....	1
Statement of the Facts and Course of Proceedings	1
ISSUES PRESENTED ON APPEAL	9
ARGUMENT	10
I. Mr. Hawkins Is Entitled To A New Trial In The Event The State Chooses To Retry Him On The Robbery Charges	10
A. Introduction	10
B. Mr. Hawkins Is Entitled To A New Trial In The Event The State Chooses to Retry Him On The Robbery Charges.....	11
1. Pursuant to I.A.R. 38, The District Court Only Had The Authority To Order A New Trial	11
2. The State Waived Any Challenge To Whether Mr. Hawkins Was Competent In January Of 2010.....	12
3. The Court of Appeals' Determination That Mr. Hawkins Is Entitled To A New Trial In Light Of The District Court's Failure To <i>Sua Sponte</i> Order A Competency Evaluation Is Law Of The Case.....	15
II. The District Court Erred In Determining That Mr. Hawkins Was Retrospectively Competent Throughout His Trial In January Of 2008	20
A. Introduction	20
B. The District Court Erred in Determining That Mr. Hawkins Was Retrospectively Competent Throughout His Trial In January Of 2008.....	20

1.	The District Court Was Without Authority To Order A Retrospective Competency Evaluation.....	21
2.	Assuming, <i>Arguendo</i> , This Court Should Hold That Retrospective Competency Determinations More Than A Year Following The Relevant Proceedings Do Not Comport With Due Process	22
3.	Assuming, <i>Arguendo</i> , Given The Passage Of Time Since His Trial, The Static Nature Of Mental Illness, And Mr. Hawkins' Actions During First Trial, A Retroactive Determination Of Mr. Hawkins' Competency Throughout His Trial Is Not Possible.....	23
CONCLUSION		25
CERTIFICATE OF MAILING		26

TABLE OF AUTHORITIES

Cases

<i>Blunt v. United States</i> , 389 F.2d 545 (D.C. Cir. 1967)	24
<i>Drope v. Missouri</i> , 420 U.S. 162 (1975)	22
<i>Dusky v. United States</i> , 362 U.S. 402 (1960)	21
<i>Edwards v. State</i> , 902 N.E. 2d 821 (Ind. 2009)	23
<i>Frazier v. Neilson & Co.</i> , 118 Idaho 104 (Ct. App. 1990)	11, 16
<i>In re Winship</i> , 397 U.S. 358 (1970)	17
<i>Leonard v. State</i> , 658 P.2d 785 (Alaska Ct. App. 1983)	24
<i>Mapp v. Ohio</i> , 367 U.S. 643 (1961)	16
<i>McGregor v. Gibson</i> , 248 F.3d 946 (10th Cir. 2001)	24
<i>Nardone v. United States</i> , 308 U.S. 338 (1939)	18
<i>Pate v. Robinson</i> , 383 U.S. 375 (1966)	20
<i>People v. Cartagena</i> , 92 A.D.2d 901 (N.Y. App. Div. 1983)	25
<i>State v. Hawkins</i> , 148 Idaho 774 (Ct. App. 2009)	12, 15
<i>State v. Hosey</i> , 134 Idaho 883 (2000)	18
<i>State v. Longoria</i> , 133 Idaho 819 , (Ct. App. 1999)	21
<i>State v. Lovelace</i> , 143 Idaho 53 (2003)	21
<i>State v. Perry</i> , 150 Idaho 209 (2010)	16
<i>Stuart v. State</i> , 118 Idaho 932 (1990)	18
<i>Stuart v. State</i> , 136 Idaho 490, (2001)	16
<i>Swanson v. Swanson</i> , 134 Idaho 512 (2000)	11
<i>Taylor v. Maile</i> , 146 Idaho 705 (2009)	11

<i>Walters v. Industrial Indem. Co.</i> , 130 Idaho 836 (1997)	18
--	----

Statutes

Idaho Code § 18-210	21
Idaho Code § 18-210 (5)(c)	21
Idaho Code § 18-211.....	21

Constitutional Provisions

Idaho Const. art. I, § 13.....	17
U.S. Const. amend. V.....	17
U.S. Const. amend. XIV	17

Rules

I.A.R. 38(c)	12, 22
--------------------	--------

STATEMENT OF THE CASE

Nature of the Case

This Court granted the State's interlocutory appeal following the district court's determination that under the law of the case doctrine, it was required to follow the Court of Appeals holding that Mr. Hawkins is entitled to a new trial. In response to the State's Appellant's Brief, Mr. Hawkins asserts that (1) the district court was without authority to perform any act except to order a new trial based upon the mandatory language of Idaho Appellate Rule 38 that requires once a remittitur has been issued by the Idaho Supreme Court, the opinion has become final and "the district court or administrative agency shall forthwith comply with the directive of the opinion; (2) the State is precluded from raising its retroactive competency claim by not addressing the issue when it was presented in the prior appeal; (3) because the remedy for a violation of the law is a necessary component to every criminal judicial decision, the Court of Appeals determination that Mr. Hawkins was entitled to a new trial in light of the district court's failure to *sua sponte* order a competency evaluation is law of the case; and (4) the district court erred in determining that Mr. Hawkins was retrospectively competent.

Statement of the Facts and Course of Proceedings

In its Opinion reversing Mr. Hawkins' convictions for two counts of robbery and remanding his case for a new trial, the Court of Appeals reiterated the facts leading up to and following Mr. Hawkins' trial as follows:

On December 15, 2005, Hawkins contacted retired Federal Bureau of Investigation (FBI) agent George Calley and expressed concerns about the safety of his sons who were incarcerated in Colorado for bank robbery. Calley was familiar with Hawkins and told Hawkins that he could not protect the boys but that he could put Hawkins in contact with a current

agent of the FBI in Boise. Hawkins told Calley that he wanted to work with the FBI and that he had been working with an assistant United States Attorney in Portland, Oregon. The next day, December 16, 2005, Hawkins robbed a Key Bank in Boise by presenting a note that demanded \$15,000 and threatened to shoot people if his demands were not met or if anyone tried to follow him. Photos of the robber were made by a security camera in the bank. Following the robbery, a teller at the bank identified Hawkins in a photographic line-up, but police were unable to locate Hawkins. After hearing and seeing news reports on the bank robbery, Calley informed law enforcement of his conversation with Hawkins and that he suspected Hawkins was the perpetrator. A few days later, Hawkins left a message on Calley's answering machine. Essentially, Hawkins said that since he had not heard from Calley, he assumed that Calley could not help him. Calley tried to call and email Hawkins back but his attempts to reach Hawkins were unsuccessful.

Several months later, on June 6, 2006, Hawkins robbed a Washington Mutual Bank in Boise in the same manner as he had done in the Key Bank robbery, by presenting a note demanding \$15,000 and threatening to shoot people. Again, a surveillance camera photographed the robber. As he was leaving with the money, Hawkins turned to the tellers and said, "By the way, my name is Faron Hawkins, and this is all because of George Calley." Hawkins called Calley a few days later and told him that he had used Calley's name in the bank robbery. Calley offered to help Hawkins find an attorney, but Hawkins did not respond to Calley's offer and terminated the conversation.

On August 10, 2006, law enforcement located Hawkins at a campground near The Dalles, Oregon, where he was staying with his wife and children in a camp trailer. When an officer attempted to make contact with Hawkins at the camp trailer, Hawkins pointed a loaded gun at the officer. The officer retreated and, after the campground was evacuated, law enforcement officers surrounded the trailer and ordered Hawkins to come out. An eight-hour standoff ensued during which Hawkins fired a gun in the direction of the officers, but eventually allowed his wife and children to leave the trailer. Hawkins was finally taken into custody after the officers shot tear gas into the trailer, forcing Hawkins to come out.

When interviewed by Oregon police, Hawkins stated that he had been a Central Intelligence Agency (CIA) operative, had knowledge of transportation of weapons to Canada, had been involved in a South American operation with a National Security Agency (NSA) advisor and, at some point, had cut a transponder out of his earlobe that had been placed there by "someone." Hawkins also claimed to be a sophisticated criminal and freely admitted that he had committed the December 16, 2005, Boise bank robbery. A warrant to search Hawkins' van, pickup, and camp trailer was obtained and executed. During the

search, several items of clothing that matched the description of items used during the Boise bank robberies, together with a checkbook containing one of the robber's demand notes, were seized. When Hawkins was interviewed by an FBI agent he stated that his wife and stepson liked to spend money, and that his wife encouraged his stepson to rob banks to get more money. He also stated that he and his wife helped his stepson rob banks by monitoring police scanners, and that he had suggested to his stepson that he should rob banks by using a demand note. However, in subsequent interviews with the FBI agent, Hawkins stated that he and his stepson were forced to commit the robberies. Hawkins claimed that the men who forced him to rob the banks threatened his wife and children. He also claimed that the men put a bomb vest on him and threatened to detonate it if he did not rob the Key Bank, and again put a bomb vest on him and forced him to wear an earpiece when he robbed the Washington Mutual Bank.

A grand jury indicted Hawkins on two counts of robbery. Hawkins moved to proceed pro se, and after an extensive *Faretta* inquiry, the district court granted Hawkins' request for self-representation but also appointed a public defender as standby counsel. Later, Hawkins again requested that counsel be reappointed and the court granted his request. After that appointment, Hawkins changed his mind and again moved to proceed pro se. The court conducted another *Farreta* inquiry, granted the motion, and appointed the public defender as standby counsel. On January 7, 2008, trial commenced and Hawkins testified on his own behalf. He admitted to the bank robberies, but claimed that they were done under duress. Hawkins stated that the people who forced him to commit the robberies did so by making threats to him, to his wife, and to his children. Ultimately, the jury found Hawkins guilty of the robberies.

Hawkins filed a motion for new trial and then moved for reappointment of counsel, and the court granted this request. A few minutes later, Hawkins' counsel advised the court that Hawkins was dissatisfied with counsel's performance because counsel did not believe there was any basis to move for a mistrial or for a new trial. Hawkins requested that he be allowed to continue to pro se argue his motions. The district court noted that Hawkins had filed a motion to "dismiss on the grounds of mental incapacity" claiming that the state's evidence showed that he was delusional. The district court denied the motion to dismiss but, based on Hawkins' claim of mental incapacity, ordered a psychological evaluation pursuant to Idaho Code § 19-2522 for purposes of sentencing. The court also declined Hawkins' motion to proceed pro se, noting that "if Mr. Hawkins is contending that he is delusional, I don't think his decision whether to hire or not keep an attorney, at this point, is appropriate."

At a subsequent hearing, the district court set forth for the record that it had never had cause to believe that Hawkins lacked the mental capacity to understand the proceedings or to assist in his own defense. The court noted that it had ordered the psychological evaluation for sentencing purposes “in an abundance of caution” based on the assertions made by Hawkins in his motion to dismiss that had been filed shortly after the jury had reached its verdicts. The court further noted that Hawkins had failed to participate in the psychological evaluation and, after questioning Hawkins, the court determined that Hawkins was asserting his Fifth Amendment rights not to participate in such an evaluation. At Hawkins’ request, the court ordered the public defender to continue to represent Hawkins and set the case over for hearing on the multiple post-trial motions that Hawkins had filed pro se. At the subsequent motion hearing, Hawkins’ counsel advised Hawkins and the court that, if asked to argue Hawkins’ post-trial motions, his position would be that the motions had no merit. Based on counsel’s representation, the court permitted Hawkins to argue his motions pro se, finding once again that Hawkins was competent to waive counsel and that he did so freely and voluntarily. Following argument, the district court denied Hawkins’ motions.

The case proceeded to a sentencing hearing, at which Hawkins was represented by the public defender. The district court imposed concurrent unified sentences of life with thirty years fixed. Hawkins timely appealed.

State v. Hawkins, 148 Idaho 774, 775-777 (Ct. App. 2009) (footnotes omitted).

On appeal, Mr. Hawkins argued that the district court erred in failing to order a psychiatric examination to determine Mr. Hawkins’ competency to stand trial. (35281 Appellant’s Brief, pp.18-22.)¹ As a remedy, Mr. Hawkins argued that he was entitled to a new trial because retroactive competency hearings are disfavored.² (35281 Appellant’s Brief, p.22 (citing *Drope v. Missouri*, 420 U.S. 162, 183 (1975).) In

¹ Contemporaneously with this brief, Mr. Hawkins has filed a motion asking this Court to take judicial notice of the briefing from Mr. Hawkins’ prior direct appeal, as well as the State’s Petition for Review and Remittitur in S.C. Docket No. 35281. For ease of referencing, citation to the briefing and documents from S.C. Docket No. 35281 will reference to the title on the document filed, as well of the docket number of the previous appeal.

² Mr. Hawkins also argued, in the alternative, that his case should be remanded for a determination as to whether he was competent to waive his Constitutional right to

response, the State argued that “the record is devoid of any evidence that would have raised a bona fide doubt about [Mr. Hawkins] mental capacity either to understand the proceedings against him or to assist in his own defense, such that the district court would have been required to order a competency evaluation on its own motion.” (35281 Respondent’s Brief, p.13.) The State, however, never addressed Mr. Hawkins’ claim that if there was error, the proper remedy was to vacate the conviction and remand for a new trial. (See 35281 Respondent’s Brief, pp.1-27.) In his Reply Brief, Mr. Hawkins again asked that the district court vacate his convictions, leaving the State free to retry him if he is deemed competent. (35281 Appellant’s Reply Brief, p.4 (citing *Drope*, 420 U.S. at 183).)

The Idaho Court of Appeals agreed with Mr. Hawkins. See *Hawkins*, 148 Idaho at 777-783. First, the *Hawkins* Court held:

Hawkins’ behavior and his stories consistently raised questions as to whether he had a rational understanding of the proceedings against him even though he appeared capable of preparing and arguing his own defense. All of these behaviors, statements, and events should have raised a bona fide doubt about Hawkins’ competency to stand trial and to conduct his own defense. Taking into account all of the indicia of bizarre notions demonstrated before trial started, there was enough evidence in this case to put the district court on notice that Hawkins’ competence was in question. Even if the pretrial conduct was insufficient to call for a competency evaluation, certainly Hawkins’ testimony during the trial presented compelling indicia that he was not in touch with reality. When taking the entire record into account, the district court should have entertained a reasonable doubt about Hawkins’ mental competency either to stand trial or to represent himself. Therefore, the district court’s failure to *sua sponte* order a mental evaluation and make a determination as to Hawkins’ competency was an abuse of discretion.

Id. at 782-783. Next, the Court of Appeals stated that the proper remedy was, “[b]ecause it is not possible to retroactively make a determination as to Hawkins’

counsel. Because the Court of Appeals did not have to address this issue in the appeal, it will not be discussed any further. (See 35281 Appellant’s Brief, pp.22-26.)

competency at the time he was tried, we must vacate the judgment of conviction and leave the state free to retry Hawkins if he is found to be competent to stand trial.” *Id.* at 783.

The State filed a Petition for Review and Brief in Support of Petition for Review with the Idaho Supreme Court. (See *generally* 35281 Petition For Review and Brief in Support of Petition for Review.)³ In its Brief in Support of Petition for Review, the State challenged the standard employed by the Court of Appeals in finding that the district court should have *sua sponte* ordered a competency evaluation, and that there was insufficient evidence to raise a doubt about Mr. Hawkins’ competency. (35281 Brief in Support of Petition For Review, pp.15-27.) The State, however, again neglected to address or argue against the Court of Appeals’ determination that Mr. Hawkins is entitled to a new trial. (See 35281 Brief in Support of Petition For Review, pp.1-27.) This Court denied the State’s Petition for Review and issued the Remittitur commanding the district court comply with the Court of Appeals’ Opinion by vacating Mr. Hawkins’ convictions, ordering that a competency evaluation be conducted, and conducting a new trial in the event the district court determines that Mr. Hawkins is competent to stand trial. (35281 Remittitur.)

On remand, the district court ordered competency evaluations to be conducted by Dr. Estess and Dr. Sombke. (R., pp.29-30, 34-35, 39-40.) In the first competency evaluation conducted by Dr. Sombke, he opined that while “Mr. Hawkins did show an adequate level of factual understanding of the court process, his ability to effectively and

³ Contemporaneously with this brief, Mr. Hawkins has filed a motion asking this Court to take judicial notice of the briefing from Mr. Hawkins’ prior direct appeal, as well as the State’s Petition for Review and the Remittitur in S.C. Docket No. 35281. For ease of reference, citation to the briefing and documents from S.C. Docket No. 35281 will

appropriately interact with his attorney is extremely impaired.” (R., p.164.)⁴ Dr. Sombke continued, “[h]is delusional belief system is totally controlling his decisions regarding his court case and he is currently unable to logically and rationally participate in a court hearing. Furthermore, he does not appear capable of interacting with his attorney in a logical and rational manner at this time and he is in need of psychiatric treatment.” (R., p.164.) Of particular note, Dr. Sombke reported that Mr. Hawkins completed the SIRS-2 test which “was designed to evaluate malingering and other forms of dissimulation.” (R., p.163.) According to Dr. Sombke, “Mr. Hawkins’ scores indicated that he was responding in a genuine manner and did not show any signs of malingering or feigning a mental illness.” (R., p.163.)

On October 15, 2010, Dr. Estess filed a two page “report” indicating that “there is no reason why Mr. Hawkins should not be able to confer with his attorney in his own defense and satisfy all of the other requirements that would allow him to be adjudicated to be competent to stand trial.” (R., pp.166-167.) At the hearing on Mr. Hawkins’ competency determination, based upon his discussions with Dr. Estess and the review of other material he was not provided at the time of his initial report, Dr. Sombke changed his mind. (11/12/10 Tr., p.20, L.22 – p.29, L.2.) Dr. Sombke testified that he now believes that Mr. Hawkins is competent to stand trial. (11/12/10 Tr., p.29, Ls.3-20.) Additionally, Dr. Estess expressed his belief that Mr. Hawkins was competent to stand trial back in January of 2008, at the time he was initially tried in this case. (11/12/10 Tr., p.100, Ls.8-13.)

reference to the title on the document filed, as well as the docket number of the previous appeal.

⁴ Dr. Sombke’s evaluation was signed on August 11, 2010. (R., p.165.)

Following the hearing, the district court determined that Mr. Hawkins was competent to stand trial. (R., pp.134-136.) Additionally, the district court found that it believed that Mr. Hawkins was competent in January of 2008, but “is constrained by the law of the case and is bound to follow the remittitur of the Idaho Court of Appeals.” (R., pp.134-136.) Appointed defense counsel for Mr. Hawkins was then allowed to withdraw from the case after alleging that he had a conflict of interest with Mr. Hawkins. (See R., pp.120-124, 137-139, 236-237; 12/5/10 Tr., p.14, Ls.5-10.) Mr. Hawkins then chose to proceed *pro se*, with the district court appointing the Ada County Public Defender’s Office as standby counsel. (12/15/10 Tr., p.6, L.8 – p.8, L.16.)

The following day, the State filed a Motion for Permission to Appeal, wherein the State asked the district court for permission to file an interlocutory appeal and determine that Mr. Hawkins was retroactively competent. (R., pp.243-252.) At the hearing on the State’s Motion for Permission to Appeal, while acting *pro se*, Mr. Hawkins stated he had no objection to the State’s request for an interlocutory appeal because “I would like to see another court take a look at exactly what is going on in this Court.” (1/26/11 Tr., p.11, L.24 – p.12, L.5.) On February 1, 2011, the district court entered a Memorandum Decision on State’s Motion for Permission to Appeal and Order Granting State’s Motion for Permission to Appeal. (R., pp.272-277.) Following this Court’s grant of the State’s request for an interlocutory appeal, the State filed a Notice of Appeal. (R., pp.367-373.)

ISSUES

1. Did the district court correctly determine that Mr. Hawkins is entitled to a new trial based upon the Court of Appeals' holding in his case?
2. Did the district court err in making the retrospective determination that Mr. Hawkins was competent in January of 2008?

ARGUMENT

I.

Mr. Hawkins Is Entitled To A New Trial In The Event The State Chooses To Retry Him On The Robbery Charges

A. Introduction

This Court granted the State's interlocutory appeal following the district court's determination that under the law of the case doctrine, it was required to follow the Court of Appeals' holding that Mr. Hawkins is entitled to a new trial. In response to the State's Appellant's Brief, Mr. Hawkins asserts that (1) the State waived its current claim that Mr. Hawkins was competent in January of 2008 because the Attorney General's Office not only failed to respond to Mr. Hawkins' claim in the first appeal that a new trial was the appropriate remedy for the district's error, but also neglected to challenge the Court of Appeals' holding that "[b]ecause it is not possible to retroactively make a determination as to Hawkins' competency at the time he was tried, we must vacate the judgment of conviction and leave the state free to retry Hawkins if he is found to be competent to stand trial" in its Brief in Support of Petition for Review; (2) because the remedy for a violation of the law is a necessary component to every criminal judicial decision, the Court of Appeals' determination that Mr. Hawkins was entitled to a new trial in light of the district court's failure to *sua sponte* order a competency evaluation is law of the case; and (3) the district court was without authority to perform any act except to order a new trial based upon the mandatory language of Idaho Appellate Rule 38 that requires once a remittitur has been issued by the Idaho Supreme Court, the opinion has become final and "the district court or administrative agency shall forthwith comply with the directive of the opinion."

B. Mr. Hawkins Is Entitled To A New Trial In The Event The State Chooses To Retry Him On The Robbery Charges

In *Swanson v. Swanson*, 134 Idaho 512 (2000), the Idaho Supreme Court observed:

“[t]he doctrine of the law of the case provides that where an appellate court states a principle of law in deciding a case, that rule becomes the law of the case and is controlling both in the lower court and on subsequent appeals as long as the facts are substantially the same.” The decision on an issue of law made at one stage of a proceeding becomes precedent to be followed in successive stages of that same litigation. “[L]ike stare decisis it protects against relitigation of settled issues and assures obedience of inferior courts to decisions of superior courts.”

Id. at 516 (citing *Frazier v. Neilson & Co.*, 118 Idaho 104, 106 (Ct. App. 1990)). More recently, as the State partially recognized in its Appellant’s Brief, the Idaho Supreme Court has further articulated the “law of the case” doctrine as follows:

The “law of the case” doctrine provides that when “the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal.” *The “law of the case” doctrine also prevents consideration on a subsequent appeal of alleged errors that might have been, but were not, raised in the earlier appeal.*⁵

Taylor v. Maile, 146 Idaho 705, 709 (2009) (internal citations omitted).

1. Pursuant To I.A.R. 38, The District Court Only Had The Authority To Order A New Trial

Idaho Appellate Rule 38 provides, in pertinent part, that:

When the opinion filed has become final in accordance with this rule, the Clerk of the Supreme Court shall issue and file a remittitur with the district court or administrative agency appealed from and mail copies to all parties

⁵ As addressed in more detail below, the italicized portion of the above quotation was not contained in either the State’s Appellant’s Brief to this Court, or the State’s Motion For Acceptance Of Appeal By Permission And Statement In Support Thereof to this Court. Despite its omission by the State, the above quotation represents the complete standard for review of “law of the case” as identified by this Court in *Taylor*. Compare Appellant’s Brief, p.7 with *Taylor*, 146 Idaho at 709.

to the appeal and the presiding district court judge or chairman of the agency. The remittitur shall advise the district court or administrative agency that the opinion has become final *and that the district court or administrative agency shall forthwith comply with the directive of the opinion.*

I.A.R. 38(c) (emphasis added).

The language of this rule is mandatory – once an opinion becomes final, the district court is required to comply with the specific directives provided by the opinion rendered by either the Court of Appeals or the Supreme Court. As such, the district court correctly determined that it was required to grant Mr. Hawkins a new trial. Accordingly, this Court should affirm the district court’s order finding that it was bound by *State v. Hawkins*, 148 Idaho 774 (Ct. App. 2009) and remand this case for the new trial that should have occurred 22 months ago.

2. The State Waived Any Challenge To Whether Mr. Hawkins Was Competent In January Of 2010

The State is precluded from now arguing that this Court should consider whether Mr. Hawkins was retroactively competent in January of 2008 because the “law of the case” doctrine prevents a party from relitigating an issue on a subsequent appeal, when it had an earlier opportunity to address the same issue, but did not.

In the instant appeal, the State argues that the Court of Appeals determination that a new trial was the proper remedy was not law of the case. (Appellant’s Brief, pp.8-11.) In making its argument, the State points this Court to its own definition for law of the case as “consistently articulated” by this Court as follows:

The “law of the case” doctrine provides that when “the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal.”

(Appellant's Brief, p.7 (quoting *Taylor v. Maile*, 146 Idaho 705, 709 (2009) (citations omitted).) Curiously missing from the State's recitation of the "law of the case" doctrine, as articulated in *Taylor*, is the very next sentence, which states, "[t]he "law of the case" doctrine also prevents consideration on a subsequent appeal of alleged errors that might have been, but were not, raised in the earlier appeal." *Taylor*, 146 at 709.

On appeal, the State argues that the Court of Appeals erred in holding that a retroactive competency determination was not possible in this case and that a new trial is the appropriate remedy. (Appellant's Brief, pp.7-11.) However, in making its argument, the State failed to disclose to this Court the complete standard for determining "law of the case" under *Taylor* in its State's Motion For Acceptance Of Appeal By Permission And Statement In Support Thereof to this Court. The State also neglected to acknowledge that the remedy granted by the Idaho Court of Appeals was first briefed by Mr. Hawkins in his Appellant's Brief in the first appeal, where in appellate counsel stated:

The question then becomes remedy. In general, retrospective competency hearings are disfavored. *Drope v. Missouri*, 420 U.S. 162, 183, 95 S.Ct. 896, 909 (1975). In *Drope*, the Supreme Court ordered that the judgment be reversed leaving the state free to retry Drope. In this case, the same remedy is appropriate. At this point, as in *Drope*, it is not possible to make an evaluation of Mr. Hawkins' competency at the time he was tried. The only remedy that will fulfill the state and federal constitutional due process guarantees is to reverse the judgment of conviction leaving the state free to retry Mr. Hawkins if he is now competent to stand trial.

(35281 Appellant's Brief, p.22.)⁶ At that time, the State had the opportunity to respond to Mr. Hawkins' argument that a new trial was the appropriate remedy. However, the State's Respondent's Brief contains no reference to retroactive competency, or what the

⁶ The attorney representing the Attorney General's Office in the instant appeal is the same attorney that represented the State in Supreme Court Docket No. 35281.

appropriate remedy would be if an error did occur. (See 35281 Respondent's Brief, pp.1-27.) Instead, the State limited itself to arguing that there was not any evidence before the district court, "such that the district court would have been required to order a competency evaluation on its own motion." (35281 Respondent's Brief, p.13.) Then, in his Reply Brief, Mr. Hawkins again asked the district court vacate his convictions, leaving the State free to retry him if he is deemed competent. (35281 Appellant's Reply Brief, p.4 (citing *Drope*, 420 U.S. at 183).) The State's Appellant's Brief in the instant appeal also does not mention this.

Following the submission of all briefing to the Idaho Court of Appeals, the Court agreed with Mr. Hawkins, finding that given the evidence before the district court, it erred in failing to *sua sponte* order a competency evaluation of Mr. Hawkins. *Hawkins*, 148 U.S. at 777-783. The Court of Appeals then concluded that the proper remedy was, "[b]ecause it is not possible to retroactively make a determination as to Hawkins' competency at the time he was tried, we must vacate the judgment of conviction and leave the state free to retry Hawkins if he is found to be competent to stand trial." *Id.* at 783. It is this last statement that the State alleged to be the error committed by the Court of Appeals.

Despite the fact the State apparently disagrees with this determination, the State fails to divulge to this Court in any of the documents filed in the instant appeal, that it filed a Petition for Review from the Court of Appeals' opinion in *State v. Hawkins*. Additionally, in the Brief in Support of that Petition for Review, the State again, *did not* challenge the Court of Appeals finding that a retroactive competency finding is not possible and Mr. Hawkins is entitled to a new trial. (See 35281 Brief in Support of Petition For Review, pp.1-27.)

Pursuant to this Court's clear holding in *Taylor*, because the State failed to challenge the alleged errors which occurred during a prior appeal, it is foreclosed from raising those claims in the instant appeal. The State was given two opportunities, first in the Court of Appeals, and then in this Court, to argue whether a new trial was the proper remedy for the error that occurred in Mr. Hawkins' trial. The State affirmatively failed to do so both times and is foreclosed from now doing so. Not only is the State seeking to circumvent the law, while Mr. Hawkins sits in jail, but the State has affirmatively failed to disclose to this Court the complete statement of the law and its own actions which, based on the part of the law it omitted, foreclose its current actions.

Accordingly, because the State did not challenge the remedy given by the Court of Appeals in *State v. Hawkins*, 148 Idaho 774 (Ct. App. 2009), it is prevented from now doing so under the "law of the case."

3. The Court Of Appeals' Determination That Mr. Hawkins' Is Entitled To A New Trial In Light Of The District Court's Failure To Sua Sponte Order A Competency Evaluation Is Law Of The Case

Regarding whether the Court of Appeals' chosen remedy for the district court's error was law of the case, the State argues first that,

the statement at issue was not necessary to the Court of Appeals' resolution of the only issue(s) it identified on appeal – i.e., "whether in the course of Hawkins' self-representation, the district court should have considered sua sponte whether Hawkins was competent to undergo trial, and if so, whether Hawkins was rational enough to represent himself rather than be represented by counsel." Whether Hawkins could or could not be retroactively deemed competent following a competency evaluation on remand had no bearing on the question actually before the Court of Appeals – whether the trial court should have entertained a bona fide doubt about Hawkins' competency such that it should have sua sponte ordered an evaluation at the time of trial. Because the question of whether it is possible to make a retroactive determination of Hawkins' competency to stand trial in 2008 was neither necessary nor relevant to the Court of Appeals' determination that the trial court should have ordered a competency evaluation during the 2008 proceedings,

it does not appear under established principles of law, that the Court of Appeals' statement that a retroactive determination of Hawkins' competency "is not possible" is actually "law of the case."

(Appellant's Brief, pp.8-9 (internal citations omitted).)

In essence, the State is arguing that the remedy, (in this case a new trial) for any district court error or constitutional violation, "has no bearing" on the actual decision rendered by the Court. Contrary to the State's position, the remedy for an error by the district court or the violation of a constitutional right is a necessary component to every criminal judicial decision, especially in the instant case where the Court of Appeals vacated the convictions, rather than merely remanding the case for a competency evaluation leaving the convictions intact. See generally *Mapp v. Ohio*, 367 U.S. 643 (1961); *State v. Perry*, 150 Idaho 209 (2010). Further, law of the case is "like stare decisis it protects against relitigation of settled issues and assures obedience of inferior courts to decision of superior courts," which is exactly what the State is asking this Court to do, relitigate an issue that has already been decided by the Court of Appeals. See *Swanson*, 134 Idaho at 516 (citing *Frazier v. Neilson & Co.*, 118 Idaho 104, 106 (Ct. App. 1990)). The State has already had the opportunity to challenge this issue and neglected to do so. The district court properly recognized that as an inferior court, it was required to follow the decision of the superior appellate court.

Next, relying on *Stuart v. State*, 136 Idaho 490 (2001) (*hereinafter*, *Stuart II*), the State argues:

although the Court of Appeals expressed its view, apparently based upon the record before it, that it is not possible to retroactively determine Hawkins competency when he was tried in 2008, there is no indication that the words chosen were actually intended by the Court to limit the trial court's power on remand to make its own finds regarding whether such a determination is possible.

(Appellant's Brief, p.9.)

The State's argument ignores the plain language of the opinion, the effect of the remedy, and the jurisdiction of the district court. Further, the instant case is substantially different than *Stuart*. In reaching its decision, the Court of Appeals stated, "[b]ecause it is not possible to retroactively make a determination as to Hawkins' competency at the time he was tried, we must vacate the judgment of conviction and leave the state free to retry Hawkins if he is found to be competent to stand trial." *Id.* at 783. In its conclusion, the Court stated, "we vacate the judgment of conviction and remand the case for further proceedings in accordance with this opinion." *Id.* The "intent" of the opinion could not be more clear, a retroactive competency determination "is not possible," so the Court of Appeals *vacated* the conviction. Certainly the State's argument – other than the fact the State affirmatively waived it – might have had legs if the Court of Appeals had not vacated the conviction and remanded for a new trial, if Mr. Hawkins was found to be *presently* competent. If the Court of Appeals had intended to do what the State surmises, it would have simply remanded the case for a competence evaluation, leaving the convictions intact.

Even if we ignore the plain language that a retroactive competence determination "is not possible" in this case, and we assume that the intent of the Court of Appeals was to remand for a retroactive competency hearing, the district court would still have no jurisdiction to re-impose the conviction without a guilty plea or finding of guilt by a jury. See U.S. CONST. amend. V. ("[n]o person shall be...deprived of life, liberty, or property, without due process of law...."); U.S. CONST. amend. XIV.; *Id.* IDAHO CONST. ART. I, § 13.; *In re Winship*, 397 U.S. 358 (1970). Moreover, on remand, the trial court can only "take actions it is specifically directed to take, or those which are subsidiary to the actions

directed by the appellate court. *State v. Hosey*, 134 Idaho 883, 886 (2000) (citing *Walters v. Industrial Indem. Co.*, 130 Idaho 836, 838 (1997)).

Additionally, the State's reliance on *Stuart* is unavailing. In *Stuart v. State*, 118 Idaho 932 (1990) (*hereinafter, Stuart I*), the Idaho Supreme Court had to consider whether Stuart raised sufficient facts in his Petition for Post Conviction Relief (*hereinafter, Petition*) that the Sheriff's Department had been recording his attorney-client conversations to withstand a motion for summary disposition. *Id.* at 935. The *Stuart I* Court remanded the case to the district court for an evidentiary hearing with instructions for the trial court to determine:

(1) whether there was recording of attorney-client conversations on the part of the Sheriff's Department; and, (2) whether the appellant's constitutional rights were violated. If such attorney-client conversations are found to have been recorded, the State will be required to show that the evidence at trial had an origin independent of the eavesdropping. Any knowledge wrongfully gained by the government cannot be used against a defendant.

Id. (citing *Nardone v. United States*, 308 U.S. 338 (1939)).

Eleven years later, Stuart's case was back before the Idaho Supreme Court after the district court determined that Stuart's constitutional rights had not been violated.⁷ *Stuart II*, 136 Idaho at 494. The trial court "applied the three exceptions to the exclusionary rule, holding that under the independent origin, inevitable discovery, and attenuated basis exceptions, the monitoring of telephone conversations did not lead to the discovery of witnesses." *Id.* On appeal, Stuart argued that based on the "law of the case," the trial court was limited to applying the origin independent exception. *Id.* at 495. The Idaho Supreme Court disagreed and held that it was not error for the trial

⁷ A correct statement of the law would be that the district court found that although Stuart's constitutional rights were violated, suppression is not appropriate remedy because the court applied the three exceptions to the exclusionary rule.

court to consider all three exceptions because “it cannot be presumed that this Court has decided that the inevitable discovery and attenuated basis exceptions should not be applied in Idaho.” *Id.*

In the instant case, unlike *Stuart II*, the language of the Court of Appeals amounted to an express limitation against a court being allowed to determine Mr. Hawkins’ competence retrospectively, whereas in *Stuart II*, the prior opinion did not limit the trial court from considering other exceptions to the exclusionary rule. *Hawkins*, 148 U.S. at 777-783. In addition, the discretion and authority of the trial court in this case is further limited by the fact the Court of Appeals vacated Mr. Hawkins’ convictions. So even if it was permissible for the district court to attempt to determine Mr. Hawkins’ competency in January of 2008, it would still be required to give him a new trial.

Effectively, the State is attempting to relitigate an issue because it neglected to do so when the issue was properly in front of the appellate court and are not satisfied with the outcome articulated by the Idaho Court of Appeals.⁸ Accordingly, as in set forth herein, because the remedy articulated by the Court of Appeals is necessary to its decision, the Court of Appeals’ holding that Mr. Hawkins is entitled to a new trial upon being found competent.

⁸ Taken to its logical conclusion, if granted relief, this Court would be encouraging every criminal defendant to relitigate every issue in their case, regardless of how many times that issue has been addressed by the appellate court, which would cause needless expense.

II.

The District Court Erred In Determining That Mr. Hawkins Was Retrospectively Competent Throughout His Trial In January Of 2008

A. Introduction

On appeal, following Mr. Hawkins' conviction on two counts of robbery, the Idaho Court of Appeals held that "[b]ecause it is not possible to retroactively make a determination as to Hawkins' competency at the time he was tried, we must vacate the judgment of conviction and leave the state free to retry Hawkins if he is found to be competent to stand trial." *Hawkins*, 148 Idaho at 783. The State filed a Petition for Review and supporting brief, which was denied by the Idaho Supreme Court. Of note, in its Brief in Support of Petition for Review, the State neglected to challenge the Court of Appeals' holding that it was "not possible" to make a retrospective determination as to Mr. Hawkins' competency throughout his trial in January of 2008. Following remand, after Mr. Hawkins was found presently competent, the district court ruled that it would find Mr. Hawkins to be retrospectively competent in January of 2008, but it was bound by "law of the case" to proceed to a new trial. Mr. Hawkins asserts that the district court erred in determining that Mr. Hawkins was retrospectively competent.

B. The District Court Erred In Determining That Mr. Hawkins Was Retrospectively Competent Throughout His Trial In January Of 2008

The failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial. *Pate v. Robinson*, 383 U.S. 375 (1966). In *Drope, supra*, the Supreme Court held that a state's statutory procedure for determining an accused's

mental capacity to stand trial is constitutionally adequate to protect a defendant's due process right not to be tried while legally incompetent. *Id.* 420 U.S. at 173.

The applicable legal standard governing a district court's decision to conduct a competency evaluation is governed by I.C. §§ 18-210 and 18-211. Idaho Code § 18-211, which requires that when there is reason to doubt the defendant's fitness to proceed as set forth in section 18-210, Idaho Code, the court shall appoint at least one qualified psychiatrist or licensed psychologist, who upon completion of an examination of the defendant shall submit a report to the court. The report should include an opinion as to the defendant's capacity to understand the proceedings against him and to assist in his own defense. I.C. § 18-210(5)(c). The issue of a defendant's fitness to proceed is determined by the trial court.

The test for determining capacity to stand trial is whether a defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as factual, understanding of the proceedings against him. *Dusky v. United States*, 362 U.S. 402 (1960); *State v. Lovelace*, 143 Idaho 53 (2003); *State v. Longoria*, 133 Idaho 819, 822, (Ct. App. 1999).

1. The District Court Was Without Authority To Order A Retrospective Competency Evaluation

As is set forth above in section I(B), which is incorporated by reference herein, because the Idaho Court of Appeals determined it was "not possible to retroactively make a determination as to Hawkins' competency at the time he was tried" and the State failed to challenge that finding by the Idaho Court of Appeal, it became law of the case. Once the remittitur was issued, the opinion becomes final and the district court is required to comply with the specific directives provided by the opinion rendered by the

Court of Appeals. I.A.R. 38(c). The district court was ordered to conduct a competency evaluation of Mr. Hawkins to determine whether he is *presently* competent and if so, then the State would be permitted to retry Mr. Hawkins. Accordingly, this Court need not address the State's argument on appeal that Idaho should permit retrospective competency determination and that a retrospective competency determination is permissible in the instant case.

2. Assuming, *Arguendo*, This Court Should Hold That Retrospective Competency Determinations More Than A Year Following The Relevant Proceeding Do Not Comport With Due Process

The United States Supreme Court has never held that a retrospective competence determination, over a year after the trial, comports with due process. The first United States Supreme Court case to address the issue was *Dusky, supra*. In *Dusky*, the United States Supreme Court remanded the case to the district court for a new competency hearing because of the "difficulties of retrospectively determining the petitioner's competency as of more than a year ago[.]" *Id.* 362 U.S. at 403. Next, in *Pate*, the United States Supreme Court refused to correct the violation of Pate's constitutional right to receive an adequate competency determination by remanding the case for a retrospective competency determination. *Id.* 383 U.S. at 386-387. The *Pate* Court reiterated "the difficulty of retrospectively determining an accused's competence to stand trial." *Id.* at 387 (citing *Dusky*, 362 U.S. at 403). The Court observed, [t]he jury would not be able to observe the subject of their inquiry, and expert witnesses would have to testify solely from information contained in the printed record. That Robinson's hearing would be held six years after the fact aggravates these difficulties." *Id.* 383 U.S. at 387 (1966). Most recently, in *Drope v. Missouri*, 420 U.S. 162 (1975), the United States Supreme Court stated, "Given the inherent difficulties of such a nunc pro tunc

determination under the most favorable circumstances, we cannot conclude that such a procedure would be adequate here.” *Id.* 420 U.S. at 183 (internal citations omitted).

Further complicating matters is that “[m]ental competency is not a static condition and is to be determined “at the time of trial.” *Edwards v. State*, 902 N.E. 2d 821 (Ind. 2009). No case better represents this problem than the instant case where the State seeks retrial, in part because, Mr. Hawkins’ retrospective competency determination was made 34 months after the conclusion of his trial. The State is now attempting to avoid a retrial because there is a “very high likelihood” that the very same issues that occurred during the first trial – where Mr. Hawkins will raise mental illness issues – and, “pursuant to the Court of Appeals’ decision, this Court will be required to stop the trial and/or declare a mistrial and attempt to obtain yet another psychological evaluation.” (R., pp.247-248.)

Accordingly, in light of the problems inherent in retroactive competency determinations, Mr. Hawkins asks this Court to hold that the remedy for a competency violation be a new trial because of the “difficulties of retrospectively determining the petitioner’s competency as of more than a year ago[.]” *Id.* 362 U.S. at 403. Further, all other determination as to whether a defendant is retrospectively competent shall be made on a case by case basis.

3. Assuming Arguendo, Given The Passage Of Time Since His Trial, The Static Nature Of Mental Illness, And Mr. Hawkins’ Actions During First Trial, A Retroactive Determination Of Mr. Hawkins’ Competency Throughout His Trial Is Not Possible

The United States Supreme Court has observed that retrospective determinations of a defendant’s competency are disfavored because of “the inherent difficulties of such a nunc pro tunc determination under the most favorable

circumstances.” *Drope*, 420 U.S. at 183. However, some courts have held that a retrospective competency determination is “permissible when a court can conduct a meaningful hearing to evaluate retrospectively the competency of the defendant.” *McGregor v. Gibson*, 248 F.3d 946, 962 (10th Cir. 2001). Those courts permitting retroactive competence evaluation look to four factors:

(1) [T]he passage of time, (2) the availability of contemporaneous medical evidence, including medical records and prior competency determinations, (3) any statements by the defendant in the trial record, and (4) the availability of individuals and trial witnesses, both experts and non-experts, who were in a position to interact with defendant before and during trial, including the trial judge, counsel for both the government and defendant, and jail officials.

Id. 248 F.3d at 962-63 (citations omitted).

Mr. Hawkins asserts that, based on the circumstance and facts presented in his case, a meaningful and accurate retrospective competence evaluation is not possible. Mr. Hawkins was convicted in January of 2008 and it was not until December of 2010, 34 months later, that the district court rendered a decision that it believed Mr. Hawkins was competent at the time of his trial. As addressed above, the United States Supreme Court has remanded cases to the district court for a new competency hearing because of the “difficulties of retrospectively determining the petitioner’s competency as of more than a year ago[.]” *Id.* 362 U.S. at 403. In *Blunt v. United States*, 389 F.2d 545 (D.C. Cir. 1967), the Court remanded a case for a new competency hearing because the hearing was held 32 months ago, which was 10 months before the trial, citing to the difficulties of retrospective competence determinations. *Id.* at 549. See also *Leonard v. State*, 658 P.2d 785 (Alaska Ct. App. 1983) (remanding a case for a new competence evaluation just over two years after the trial, because “We feel that the difficulty of making a retrospective determination of Leonard’s competence to stand trial requires


that we order a new trial proceeded by a competence determination.”); *People v. Cartagena*, 92 A.D.2d 901 (N.Y. App. Div. 1983) (holding that “Given the difficulties of determining, *nunc pro tunc*, defendant’s fitness to proceed, the post conviction hearing, held more than one year and four months after the plea . . . could not adequately protect defendant’s due process right where defendant was not examined for competency at the time of the pleas and sentences.”). Thus, Mr. Hawkins asserts that 34 months since the passage of his trial is too long for a retrospective competence evaluation, especially considering the static nature of mental illness. Even the district court expressed its concern that if Mr. Hawkins were retried, it would be required “have a psychiatrist present during the trial” in case Mr. Hawkins were to act out during the new trial. (R., pp.274-275.) Certainly, it would be extremely difficult to determine whether Mr. Hawkins maintained competency throughout his trial 34 months ago considering the static nature of mental illness.

Accordingly, Mr. Hawkins asks this Court to remand his case back to the district court for a new trial.

CONCLUSION

Mr. Hawkins asks that this Court affirm the district court’s order holding that it was bound by “law of the case” and remand Mr. Hawkins’ case for a new trial.

DATED this 23rd day of March, 2012.



ERIC D. FREDERICKSEN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23rd day of March, 2012, I served a true and correct copy of the foregoing RESPONDENT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

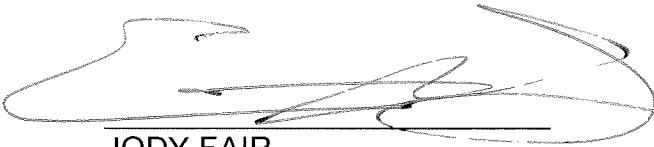
FARON RAYMOND HAWKINS
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MICHAEL R MCLAUGHLIN
DISTRICT COURT JUDGE
E-MAILED BRIEF

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